



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

August 28, 2020

BY ECF


The Honorable Analisa Torres
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007


Re: *United States v. Brian Kolfage, et al.*, 20 Cr. 412 (AT)

Dear Judge Torres:

The Government respectfully submits this letter to bring to the Court's attention certain public social media posts by defendant Brian Kolfage. Since his arrest in connection with this case, Kolfage has repeatedly described the prosecution on social media as, among other things, "political," "an assault on every [We Build the Wall] donors['] freedom," a "witch hunt," and an effort to take "political prisoners." As the Supreme Court repeatedly has recognized, extrajudicial statements about a case – like those made by the defendant – can create a substantial risk that a large portion of the jury pool will be tainted by pretrial publicity. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Accordingly, for the reasons stated below, the Government respectfully requests that, at the upcoming initial conference to be held on August 31, 2020, at 1:00 p.m., the Court draw the parties' attention to Local Rule 23.1, which contains provisions relating to extrajudicial public and media statements by the parties, and articulate any further expectations the Court may have about the appropriate nature of extrajudicial statements relating to this case.

Since at least August 21, 2020, which was the day after Kolfage was arrested, he has made a steady stream of public statements via posts on his Facebook account regarding this case. In total, Kolfage has made at least a dozen extrajudicial statements about this case on his Facebook account, which has more than 630,000 followers and can be viewed by anyone who visits his page, between the time of his arrest and today. *See* <https://www.facebook.com/Brian.Kolfage.jr/>. Kolfage has also streamed "live" videos featuring discussions of the case on his Facebook page. The statements have typically contained expressions of opinion about the defendant's innocence and the merits of the case, among other subjects, and many of them have been highly inflammatory. The following is a sample of posts by Kolfage on his Facebook page.




**Brian Kolfage** ✓
Yesterday at 9:42 AM · 🌐




This case by the SDNY is an assault on every WBTW donors freedom. They want to seize your information, which many of our donors are big corporate executives. They want to target you each for political reasons. Just like we saw with the NRA, they want to know who the supporters are. They are looking to take political prisoners, and shut down any non profit they want for any reason. Open your eyes, this is a powerful grab by intimidation.

I've always been a vocal fighter for freedom. And if we continue to allow a weaponized judicial system to attack people for political purposes, it will be the beginning of the end for this republic.

I gave 3 limbs defending this freedom, and I'd proudly give another to fight back at this injustice to preserve the future of this nation.

 2.7K

249 Comments 830 Shares




**Brian Kolfage** ✓
August 21 at 11:17 AM · 🌐

The witch hunt is on! I'm not going to be bullied into being a political prisoner for my beliefs. I have fought hard for these freedoms and the SDNY is on a all out assault to take down every Trump insider from the 2016 election, that means Bannon. They will ruin innocent peoples lives in order to have a war trophy pinned to the wall just before elections.

I've obtained one the best super lawyers around who isn't afraid to fight back at the politically motivated assaults against me. This is where the line of freedom is drawn. If you allow the weaponized apparatus to win, we lose freedom. They will go after anyone for anything they want, anytime.

They wont ever investigate their friends like the Clinton Foundation. They've targeted Trump's inner circle- Flynn, stone, Manafort, Cohen and now Bannon. If it walks like duck, quack likes a duck, its a duck. We cant let the weaponized judicial system take anymore political prisoners.

FIGHT BACK!

 18K

4K Comments 4.9K Shares

**Brian Kolfage** ✓

1 hr · 🌐

Political Prisoner: "The detention is the result of judicial proceedings that are clearly unfair and connected with the political motives of authorities."

- This has been going on since 2016 with the liberal judicial systems. This undermines our entire constitution. We slowly seeing these progressive liberals invoking totalitarianism right into the highest levels of our judicial system, weaponizing an entire apparatus to take down who ever they want. We see daily videos where Antifa and BLM terrorists terrorize innocent people and force them to raise their fists to BLM or they terrorize and shame them, sometimes attacking them right in public. Its happening on so many different levels. Everyday Americans need to wake up! There's no way the average American can support this.

We are on the brink of collapse, Trump is our only hope.



676

67 Comments 221 Shares

**Brian Kolfage** ✓

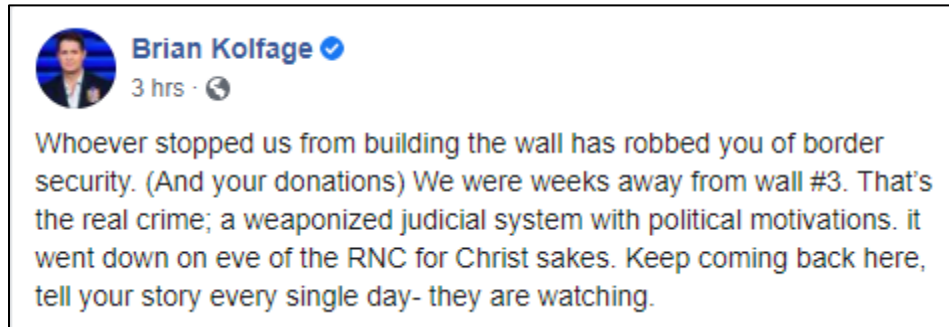
August 23 at 1:14 PM · 🌐

FIGHT BACK! Don't be silenced. They want us all to be POLITICAL PRISONERS! I commend each of you for speaking up. The truth will come out, just like we saw with Chief Eddie Gallagher, their evidence was wrong and misguided with deceit. This is #WAR for control of the most powerful country in the world.



MARKETWATCH.COM

These 'We Build the Wall' donors say they aren't victims of fraud: 'I hope I get to donate again'



Kolfage also has made several posts relating to this case on his Instagram page, which has more than 68,000 followers and can be viewed by anyone who visits his page. See https://www.instagram.com/brian_kolfage/. Those posts include the following.



The potential effect of Kolfage's posts has been amplified by media coverage of them. See, e.g., Ben Feuerherd, *Accused Fraudster Brian Kolfage Rants Against Feds on Facebook*, N.Y. Post, Aug. 21, 2020, <https://nypost.com/2020/08/21/accused-fraudster-brian-kolfage-rants-against-feds-on-facebook/>.

On August 25, 2020, the Government drew many of these posts to the attention of Kolfage's attorney, and expressed concern about their potential effect on witnesses and victims (many of whom appear to follow Kolfage's social media accounts), as well as the potential to taint a future jury pool. Unfortunately, since bringing these concerns to the attention of counsel, the posts appear to have continued unabated since that conversation, and the Government has been given no assurances by counsel that Kolfage intends to refrain from such statements in the future.

Local Rule 23.1 generally prohibits extrajudicial statements of opinion that a reasonable person would expect would create “a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.” SDNY Local Rule 23.1(a). The Rule further provides, in relevant part, that statements of “opinion as to the accused’s guilt or innocence or as to the merits of the case or the evidence in the case” are among those that “presumptively involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.” SDNY Local Rule 23.1(d)(7).¹

In light of the foregoing, the Government respectfully requests that the Court, at the initial conference scheduled for August 31, 2020, at 1:00 p.m., remind the parties’ of their obligations under Local Rule 23.1, which, as noted, contains provisions relating to public and media statements by the parties during the pendency of the case, and articulate any further expectations the Court may have in this regard. The Government notes that the Rule further provides that the Court “may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury” Local R. 23.1(h). The Government does not seek such relief at this time, but it may do so if any defendant persists in making extrajudicial statements that are likely to interfere with the Court’s ability to conduct a fair trial with an impartial jury in this case.

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney

By:



Nicolas Roos
Alison G. Moe
Robert B. Sobelman
Assistant United States Attorneys
(212) 637-2421/2225/2616

Cc: All Counsel of Record

¹ By contrast, the Government has made a single short public statement by way of a press release announcing the charges issued on August 20, 2020, that complied in all respects with the restrictions imposed by Local Rule 23.1. Moreover, and consistent with its general practice, the Government does not intend to make any further extrajudicial statements regarding the case, with the possible exception of future press releases announcing significant events in the case, typically limited to guilty pleas, trial convictions, or sentencings, all of which will be drafted to comport with the requirements of the Rule.